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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

NATIONAL FOOTBALL LEAGUE, et al.,
Petitioners,

VS.

OAKLAND RAIDERS, LTD., and
LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Respondents.

Brief of Respondent Los Angeles Raiders (formerly "Oakland Raiders") In Opposition to Petition of National Football League For Writ of Certiorari

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36pp

QUESTION PRESENTED

Are not any peculiarities or individualities of professional football adequately cared for by the Rule of Reason? Or must a new antitrust doctrine—of unknown content—be created, 94 years after enactment of the Sherman Act? And, if so, is that not the task of Congress?

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Respondents.

Brief of Respondent Los Angeles Raiders (formerly "Oakland Raiders") In Opposition to Petition of National Football League For Writ of Certiorari

THE PETITION ITSELF PRESENTS NO QUESTION

We state a "question" on page i because the petition itself presents no question. To be sure, there is a single "Question Presented" stated thus:

> "Whether adherence by the members of a professional sports league to the league agreement designating the locations in which each member will conduct league operations constitutes a conspiracy among business competitors condemned by Section 1 of the Sherman Act."

But that sums up to nothing more than asking whether there should not be a reversal of the judgment that petitioners, the defendants (hereafter "NFL"), violated Sherman Act, Section 1. This hardly serves the purpose of Rule 21.1(a). *Seaboard Air Line R. Co. v. Watson*, 287 U.S. 86, 91 (1932); *General Talk. Pictures Corp. v. Western El. Co.*, 304 U.S. 175, 177-8 (1938).

It is elementary that whether conduct is a "conspiracy . . . condemned by Section 1 of the Sherman Act" is comprised of three elements:

(1) Concerted action of two or more,[1]

(2) Constituting a restraint of trade,

(3) Which is unreasonable.

The petition's question does not tell whether what petitioners contest is the presence of "concerted action", or that the concert was in restraint of trade, or that the restraint was unreasonable.

The petition's avoidance of pinpointing any questions about the law reveals that what NFL seeks is what *only*

All emphasis in quotations in this brief is added unless otherwise noted.

[1]It is of course irrelevant whether the concerted action be called a "conspiracy", an "agreement", a "contract", or a "combination".

Congress can grant, an exemption of professional football, in whole or in part, from the reach of the Sherman Act. It sought and was denied that exemption in 1958, in 1964, and in 1965. In 1961, National Football League gained some exemption from the Sherman Act with respect to joint telecasting of games (75 Stat. 732, 15 U.S.C. §§ 1291, 1292). In 1966, it obtained exemption for the mere fact of merger of sports leagues (intended for a merger of the American Football League and National Football League) (15 U.S.C. § 1291). Ever since the present action was commenced, NFL has been asking Congress for further exemption from the Sherman Act, in the very respects involved in this case, already denied in 1958, 1964, and 1965. See pp. 25, 26, *infra.*) Being unsuccessful in its requests to Congress, NFL now seeks the exemption from this Court in the guise of judicial clarification of what needs no clarification.

STATEMENT OF BASIC FACTS

A brief summary of basic facts will place the case in context.[2] A jury having spoken, conflicts and disputed inferences have been resolved against petitioners.

Twenty-eight separate football clubs, some corporations, some partnerships, some individual ownerships, each in business to make a profit for itself, entered into an agreement to play football among themselves. The agreement is the NFL Constitution and Bylaws (Ex. 38). The apparatus by which the arrangement is administered is called "The National Football League", described in the title to the Constitution as an "unincorporated association". It is nothing more than the expression for the contractual interrelationship of the member clubs. The purpose of the association was not to forward any business of NFL's, for NFL

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[2]All facts stated appear in the opinion of the Court of Appeals except for amplifying detail, for which other record reference is given.

has none, but, as is stated in Constitution Article II, Rule 2.1,

> "[t]he purpose and objects for which the League is organized are:
>
> "(a) To promote and foster the *primary business of League members, each member being an owner of a professional football club* located in the United States.
>
> * * *
>
> "2.2 The League is not organized nor to be operated for profit." (Pet., p. 12a)

From the beginning, the agreement contained provisions to *preserve the monopoly of each member* in its own area, to give each "territorial exclusivity" by assigning *ownership* of a territory to each club, to protect each from competition of any other. Article IV, in which the relevant rules appear, is labeled "Territorial Rights". Rule 4.3 provided that no member may transfer to "a location within the home territory of any other club" without approval by "unanimous vote". The rule was adopted when NFL thought that football was immune from the Sherman Act. When this Court held otherwise (*Radovich v. National Football League*, 352 U.S. 445 (1957)),[3] NFL unsuccessfully asked Congress to legalize that very rule. Mr. Bert Bell, Mr. Rozelle's predecessor as NFL Commissioner, told Congress in 1958 that the purpose of the rule was to protect each club from competition, from "territorial invasion".[4] Con-

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[3]In *NCAA v. Board of Regents of Univ. of Okla.*, ... U.S. ..., 82 L.Ed.2d 70, 104 S.Ct. 2948 (1984), it was held that even collegiate football—free of the total commercialism of professional football—is answerable to the law.

[4]Hearings Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, 85th Congress, Second Session, on Organized Professional Team Sports, July 1958, at pp. 392-99.

NFL's Commissioner, Rozelle, admitted from the witness stand that Rule 4.3 was adopted to protect each club from competition (Tr.2d 2321, 2323, 2375).

gress refused to grant the exemption. NFL sought it again in 1964 and again in 1965, and was again refused (see discussion at pp. 24, 25 below).

Nevertheless, NFL stubbornly kept the rule. For example, following the merger agreement between NFL and AFL in 1966 and before its consummation in 1970, AFL's counsel vainly urged that the territorial rule, now Rule 4.3, be dropped as plainly illegal under the Sherman Act (Tr.2d 4467, 2772-74). And Davis, AFL Commissioner before the merger agreement, and later the General Partner of the Raiders, concurred in the objection. NFL's counsel advised that the "exclusive territory provision was inherently vulnerable to antitrust challenge" (Tr.2d 2797-98). As a condition of agreeing to the merger, NFL even insisted on payment by the clubs of the American Football League of $8 million to go to the San Francisco *Forty-Niners* as compensation for invasion of the Forty-Niners' territory by the Raiders, and of $10 million to go to the New York *Giants* for invasion of the Giants' territory by the Jets (Tr.2d 2329-30).

The purpose of Rule 4.3 has never changed. A vast amount of evidence was placed before the jury to show that the original purpose—to shield each club from competition —has remained the same (*e.g.*, Tr.2d 2805, 7052). By its verdict in favor of plaintiff and Raiders the jury so found.

In 1978 the Los Angeles Rams announced that in 1980 it would quit Los Angeles and move to Anaheim. Seeking a team to fill the vacancy, plaintiff Los Angeles Memorial Coliseum Commission, owner and operator of the Los Angeles Coliseum where the *Rams* had played its home games, filed this suit. Thereupon Mr. Rozelle, NFL's commissioner, and Mr. Carothers, its counsel, called a meeting of the member clubs to tell them that Rule 4.3 was indefensible under the Sherman Act, "clearly illegal", that so long as it remained there was "no defense" to the lawsuit, but that, in hope of "negating" the lawsuit, the rule should

be amended to change the vote required for permission to transfer a club's location from unanimity to three-quarters. Even that amendment, they said, was of dubious legality, but it might get by as less offensive than the then rule (Tr. 2d 4557-58, 2424; Ex. 191). The amendment also extended the rule to any relocation. The amendment was declared adopted. At the same meeting, the *Rams* asked approval of its relocation from Los Angeles to Aanaheim, and approval was cursorily voted, without inquiry, without investigation, without study.

The term of Raiders' license or lease to use the Oakland Coliseum ended December 31, 1979. Raiders believed that with the demand for astronomical player salaries and other costs foreseen for the 80's, a stadium, both small and out-of-date, like the Oakland Coliseum, would not permit Raiders to generate revenues sufficient to enable it to be competitive with the other clubs of the league. Negotiations to obtain renewal on acceptable terms with long overdue modernization of the stadium reached agreement (Tr.2d 4865-70) but then collapsed when Oakland was assured by NFL that it would not let the Raiders move. Oakland, thus assured that Raiders had no bargaining power, reneged on the agreement (Tr.2d 4877, 4879-83).[5]

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[5]The eminent domain suit then brought by the City of Oakland to condemn the Raiders is referred to in the opinion of the Court of Appeals and in the petition at p. 10. After the opinion of the Court of Appeals, a judgment in the eminent domain suit in favor of Raiders and against the City was re-entered, after trial, on August 10, 1984. The petition states that the City has filed a petition for writ of mandate (mandamus) to review that judgment and application for injunctive relief, and that it is pending in the California Supreme Court. But that petition was *denied* on September 27, 1984.

The evidence in the eminent domain case on the subject of Oakland's reneging and the evidence on the subject in this case are essentially the same. The express findings in that case show

Raiders then arranged to move to Los Angeles. Thereupon NFL, resorting to Rule 4.3, voted that the Raiders could not move. NFL refused to schedule Raiders' home games in Los Angeles, and it obtained an interlocutory injunction in a California state court in Oakland, California, against the Raiders' moving on the basis of Rule 4.3.[6]

Raiders cross-complained against NFL and the other clubs (hereafter collectively referred to as NFL), charging violation of Sherman Act, Section 1, and also charging breach of the *obligation of good faith and fair dealing inherent under California law in every contract.* The case was jury tried. The jury returned a verdict that NFL violated the antitrust law, and it *also* returned a separate verdict that the NFL had violated the obligation of good faith and fair dealing. The verdicts rested on an abundance of evidence that NFL and its member clubs denied the

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what is implicit in the verdict of the jury in the present case. The eminent domain court (a Northern California court, not a Southern California court) found:

> "On January 22, 1980, proposals for a new agreement were made to The Raiders by a committee representing the [Oakland-Alameda County Coliseum] Commission. Terms were then informally agreed upon which were characterized by the Mayor of Oakland, a committee member, as reasonable to the parties and meeting the legitimate needs of The Raiders. According to the evidence, the Commission did not execute this proposed agreement because a member of the Commission phoned Mr. Rozelle and was assured by him that the NFL would not permit The Raiders to move from Oakland. This promised restraint was unlawful."

The court in the eminent domain case also found

> "that the City of Oakland acted in concert with the National Football League to prevent The Raiders from moving from Oakland through a combination of City's exercise of eminent domain and the NFL's refusal to consent to the move."

[6]That injunction was dissolved in 1982 at NFL's request after the judgment of the trial court in this case that Rule 4.3 as applied was illegal.

Raiders the right to move, not for any legitimate reason, but out of animosity, to protect its anticompetitive rules, and to place the Raiders, the "winningest" club in football, at a competitive disadvantage.[7]

Thus, until the jury verdict, Raiders were held prisoner in Oakland, totally excluded from Los Angeles, denied the right to compete with the Los Angeles Rams in that market and denied the ability to be competitive with the other clubs in the '80s, and the Los Angeles Coliseum was denied the right to compete with the Oakland Coliseum for the tenancy of the Raiders.

With these basic facts before us, we turn to the legal issues.

SUMMARY OF ARGUMENT FOR NOT ISSUING A WRIT.

1. The individualities of professional football served their full possible function by getting the case to the jury on the Rule of Reason standard, although ordinarily allocation of territories is illegal *per se*. The "ancillary restraint" doctrine would do no more, and in fact less. It would have required use of the least restrictive alternative, and here the trial court's instruction applied a much milder burden. The jury having spoken and found "unreasonableness", NFL cannot escape unless there were either no restraint at all or no concert.

2. Self-evidently, there was a restraint of trade, for both the Raiders and Los Angeles Coliseum were restrained from doing what otherwise they would have done competitively, and each club enlisted the aid of every other to maintain a rule of arbitrary exclusion to protect itself against any "invasion" by anyone else.

3. There was concert of action. The NFL defendants were not a "single entity" but 27 clubs, each separately owned, in a horizontal relationship of contract, not con-

trolled by a single will or conscience. Thus not *Copperweld* but *Soccer* controls.

4. What NFL seeks is an exemption from the Sherman Act which only Congress can give, which NFL has repeatedly sought of Congress, and which Congress has repeatedly declined.

ARGUMENT

I. The Jury Having Spoken, No Issue About Unreasonableness Exists. Therefore NFL Wishes to Escape the Rule of Reason.

Ordinarily, the controversy in an antitrust case is whether the reasonableness of the restraint is to be tested by a *per se* standard or by the Rule of Reason. In all other economic activity, a division or allocation of territories is illegal *per se*.[8] And the restraint of trade in this case consisted of *division and allocation of territory,* maintaining "territorial exclusivity", regional protection of each club from competition, preservation of monopolistic satrapies. Nevertheless, NFL successfully persuaded the trial court to put the case to the jury on the Rule of Reason standard, on the basis of the particular character of a professional sports league.

A notable fact is that NFL is *not* complaining of any holding that its conduct was *per se* illegal, for there was no such holding. NFL leaps far to the other end of the spectrum to contend that its conduct was *per se lawful*! Thereby it totally evades the issue of the *unreasonableness* of its conduct and seeks to escape the consequences of the elementary law that the reasonableness of a restraint of

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[7]Petition (p. 4) asserts that the 27 NFL clubs refused to allow Raiders to move after investigation. Raiders' evidence was that the investigation was a sham, by a "stacked" committee. The jury verdict sustained that version.

[8]*United States v. Topco Associates,* 405 U.S. 596 (1972); *United States v. Sealy,* 388 U.S. 350 (1967); *North American Soccer v. National Football League,* 670 F.2d 1249, 1258 (2 Cir.), *cert. denied,* 459 U.S. 1074 (1982).

trade is a question for the *factfinder,* here the jury. *Continental T.V. Inc. v. G.T.E. Sylvania Inc.,* 433 U.S. 36 (1977).[9]

NFL paints the individual characteristics of the professional sports business as different from a variety of other businesses. Its argument both starts and ends with the premise that there is a significance of a sports "league". The premise has never been disputed. Professional football is a species of business in which numerous separate entities engage, each for profit, and by the nature of the business the clubs must play each other. To the end of arranging the games and administering the playing against each other, cooperative action *is* necessary. The significance of a league is that it is the apparatus to administer the playing of games. *Within that context and for that limited purpose,* agreement and cooperation can be reasonable. But insofar as cooperative action infringes upon the freedom of competition, the law is violated.

The particularities of professional football *do* enter into antitrust consideration about legality of conduct. But the point where they enter is at the inquiry whether the particular agreement or conspiracy under review is illegal *per se* or is to be tested by Rule of Reason. That is precisely what the trial court held (Pet., p. 59a):

> "But such unique features [of NFL] are relevant in weighing the reasonableness of the restraint at issue in this case—a task for the jury—and do not suffice to exempt that restraint from antitrust scrutiny altogether by establishing a single entity defense."

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[9]As there said (p. 49):

> "Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."

Betaseed, Inc. v. U and I Inc., 681 F.2d 1203, 1228 (9 Cir. 1982), phrased the matter succinctly so: "[T]he reasonableness of a restrictive practice is a paradigm fact question".

Rule of Reason is a remarkable instrument, supple, flexible, and acute for taking into consideration the particularities or individualities of a particular industry in adjudging antitrust violation. The Rule of Reason gives the Act "both flexibility and definition", *Nat. Soc. of Professional Engineers v. U.S.*, 435 U.S. 679, 688 (1978). Here all the peculiarities of professional football expatiated on in the petition were presented to the jury for its consideration. NFL was permitted to adduce all the evidence it desired, its counsel argued to the jury freely, and the trial court gave these instructions:

> "The antitrust laws are not intended to frustrate legitimate business operations or to prohibit a degree of mutual cooperation among businesses when such arrangements have no significant and unreasonably restrictive effect on commercial competition in interstate commerce and trade." (Tr.2d 7209)
>
> * * *
>
> "In deciding whether Rule 4.3 is an unreasonable restraint on competition, you must consider all relevant factors. You should consider the following factors, among others: First, the nature of the particular industry involved; second, the facts which are peculiar to the particular industry involved; third, the nature of the restraint and its effects, actual and probable; fourth, the history of the restraint, and fifth, the reasons for engaging in the particular restraint." (Tr.2d 7216-17)
>
> * * *
>
> "In addition, in deciding whether or not Rule 4.3 is unreasonable, one factor you may consider is *the degree of mutual cooperation inherent among the member clubs of a professional sports league and the extent to which professional sports leagues differ from ordinary kinds of businesses.*
>
> "*For example, no NFL club acting alone can produce NFL football games and telecasts.*" (Tr.2d 7218)

NFL's petition refers to the doctrine of "*ancillary restraints*" (Pet., pp. 21-22). That doctrine relates to the situation of certain agreements for legitimate purposes in which there are incidental or "ancillary" restraints. One need not tarry over whether the doctrine applies to this kind of case, because the function of "ancillarity" in antitrust analysis is merely to remove, in some instances, the *per se* label from restraints otherwise illegal *per se* and to permit them to be judged by Rule of Reason treatment. So Bork, "Ancillary Restraints and the Sherman Act", 15 ABA Antitrust Law Section 211, 212 (1959), cited in the petition, states:

> "The ancillary restraint is thus tested in the same manner as all other *non-per se* restraints. The function of *ancillarity,* then, is to remove the *per se* label from restraints otherwise falling within that category."

So also, Restatement (Second) of Contracts § 188 (1981); *Aydin Corp. v. Loral Corp.,* 718 F.2d 897, 901 (9 Cir. 1983).

Here, not only was Rule of Reason treatment given by the trial court to NFL, *the court's jury instructions gave NFL more favorable treatment that the ancillary restraint doctrine would accord it.* As the Restatement, § 188(1)(a) and comment (d) teaches, the ancillary restraint rule does not permit a "restraint . . . greater than is needed to protect the promissee's legitimate interest"; the restraint must be the *least* restrictive *necessary* to achieve the legitimate end. Here, by contrast, the jury was instructed that the fact, if it were a fact, that "Rule 4.3 imposes a restraint broader than reasonably necessary to achieve its purpose" was only one factor, and that the jury was to consider "whether Rule 4.3 was fairly necessary in the circumstances of the case or whether it exceeded the outer limits of restraint reasonably necessary to protect the defendants' legitimate purpose" (Tr.2d 7218). Rule 4.3 could pass this test even though it was not the least restrictive alternative. In *North American*

Soccer v. National Football League, supra, 670 F.2d 1249, the Second Circuit imposed the stricter standard that if a less restrictive alternative is available the use of the more restrictive is unreasonable. This Court denied certiorari, 459 U.S. 1074 (1982). Justice Rehnquist dissented from the denial because, *inter alia,* he disagreed that availability of a less restrictive alternative was decisive and believed "that the possibility of less restrictive alternatives is only one among many proper considerations for the factfinder" (459 U.S. at 1080). In the present case precisely that more relaxed standard was given to the jury. It may be noted, in this connection, that the petition (p. 22) misleadingly states that the court below required the "location agreement to survive a 'less restrictive alternative' analysis". That is not so. *Even with the less rigorous instruction, the jury found that NFL's conduct was unreasonable.*

The petition (pp. 3-4) assigns to Raiders the contention that any "limitation on an individual member's ability to determine unilaterally the location in which it will" operate violates the Sherman Act. That, too, is not so, and it never has been so. Raiders have never asserted that kind of position, which NFL has characterized as "anarchy". Raiders have always agreed that NFL has a legitimate interest in where any member club may play its home games. It is NFL that has taken the extreme position, at the other pole, and it has become more extreme in its contention as the litigation has proceeded. At the beginning, in 1978, Commissioner Rozelle listed the several considerations he thought relevant to "where new or existing franchises shall be located or transferred" (Ex. 41, ¶ 8; Ex. 2344). They were travel costs, stadium appeal, effects on gate receipts, effects on TV scheduling and ratings, league schedules, and a number of others. But at the trial NFL witnesses conceded (Tr. 2d 6044-46, 7062), and Raiders' Managing Partner, Mr. Davis, testified (Tr.2d 4610-11) that a transfer of the Raiders to Los Angeles would not have adversely affected

any one of the listed factors. None of the factors listed by Mr. Rozelle as pertinent to a relocation is mentioned in Rule 4.3. None was even put to the NFL clubs when they voted to prevent the Raiders from moving. The rule provided no standards for determining whether a club might move. Any clubowner could vote against another club's transfer of location for any reason or for none, for malice or pique, and the vote would count without inquiry into the reason for it (Tr.2d 7061-62). There were no "guidelines".

In 1978, when the rule was amended, Mr. Davis objected both to the rule and the amendment, insisting that the correct course was to remove the control of transfers of location from the selfish caprice of the clubowners, to establish *wholly objective* standards to determine whether a club could move, to be applied in case of dispute by an impartial tribunal (Pet., p. 27a). Davis' objection to the lack of objective standards of rules subjecting one to the decision of competitors and thus capable of being made "arbitrarily and capriciously" is an objection shared by the antitrust law, *Radiant Burners v. Peoples Gas L. & Coke Co.*, 364 U.S. 656, 659 (1961).[10]

The Raiders were prevented from moving to Los Angeles, and the Los Angeles Coliseum was prevented from obtaining the Raiders, by the capricious and arbitrary exercise of the power conferred by Rule 4.3 *without any justifying reason ever being required, sought, or being given by any club, and, as the jury found, in violation of the obligation of good faith and fair dealing.*

NFL's position is the defiant one that it has the *autocratic* right to fix the locations of teams, free of the Sher-

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[10]To same effect, *Hydrolevel Corp. v. Am. Soc. of Mech. Engineers*, 635 F.2d 118, 127 (2 Cir. 1980), *aff'd., American Soc. of Mech. Engineers v. Hydrolevel Corp.*, 456 U.S. 556 (1982); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1381-82 (5 Cir. 1980).

man Act's survey of reasonableness, not answerable to either authority or principle. It is that extreme position that the judgment in the case adjudicated to be unlawful. Nothing was adjudicated about the lawfulness of some nonexistent set of objective standards applied by impartial machinery.

In fn. 6 on page 7 the petition refers to L. Koppett, *Sports Illusion, Sports Reality,* p. 285 (1981), as an economist and commentator who has recognized the unique nature of league football. But the thrust of what Koppett said is wholly contrary to the position NFL takes in its petition. Said he (at p. 287):

> "Sports authorities have always maintained that they will take their chances with any rule-of-reason defense, and be able to live with the consequences, win or lose. What terrifies them, and hangs over them as a perpetual threat, is the possible finding that something is a per se violation. The per se doctrine is generally applied to price fixing, group boycott, and territorial division of markets—activities built into sports as we know it. Some indication, by means of legislation, that in antitrust cases, sports businesses can have the rule of reason applied to *all* their operations, would ease the climate without threatening the safety of the republic or the legitimate rights of anyone." (Emphasis in original.)

Legislation, said Koppett, freeing league sports from *per se* treatment and letting all their practices be judged by Rule of Reason would be enough. In this case NFL was judged by the supple Rule of Reason. To maintain its position, it must look elsewhere. But looking elsewhere, it fails to make clear whether it claims that (a) there was no concert of action or (b) that there was no restraint. It approaches each but glides from it to the other to avoid becoming answerable to either. We consider each of these areas in turn.

II. Patently There Was a Restraint of Trade.

Tucked away (Pet., p. 20, and elsewhere) is a sentence asserting that the issue is whether the league agreement on team locations constitutes a restraint of competition! This is astonishing, because what constitutes a "restraint" of trade is the one area of antitrust law, apart from labor strife, where there has never been disputation or difficulty.

"Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence", *Chicago Board of Trade v. United States,* 246 U.S. 231, 238 (1918). Whatever prevents a person from doing what he would otherwise do or compels him to do what he otherwise would not do is a "restraint"; and, if the subject of the restraint is economic activity, the restraint is a restraint of trade. A concert whereby the parties "put themselves into a situation of restraint upon their freedom to carry on . . . commerce according to their own choice and discretion" is an antitrust restraint, *Anderson v. Shipowners Asso.,* 272 U.S. 359, 365 (1926). "Coercive activity that prevents its victims from making free choices between market alternatives" is a restraint, *Associated General Contractors v. Carpenters,* 459 U.S. 519, 528 (1983). In the *NCAA* case (*NCAA v. Board of Regents of Univ. of Okla., supra,* 82 L.Ed.2d at 82 (1984)), the Court remarked:

> "There can be no doubt that the challenged practices of the NCAA constitute a 'restraint of trade' *in the sense that they limit members' freedom to negotiate* and enter into their own television contracts."

Nor can petitioners escape this elementary fact by admitting a "restraint" but asserting that it was not on "competition". One need merely look at the facts. Before the trial court's judgment in mid-1982, the Raiders were prevented from playing their home games in Los Angeles, in "tremendous competition", "head-to-head", with the Los Angeles Rams (Tr.2d 5037-38). Before the judgment, the Los

Angeles Memorial Coliseum was prevented from competing with the Oakland-Alameda County Coliseum for the Raiders as a tenant. After the judgment removed NFL's road-block, Raiders played in Los Angeles in the 1982, 1983, and now 1984 seasons, and the Los Angeles Memorial Coliseum was able to obtain the Raiders as a tenant.

The restraint on competition was even more sweeping than these particulars. The greater restraint was succinctly expressed by Judge Learned Hand and quoted by Justice Frankfurter in his opinion in *Associated Press v. United States,* 326 U.S. 1, 27 (1945).

> "'Although, as we have said, only a few members will have any direct personal interest in keeping out an applicant, the rest will not feel free to judge him regardless of the effect of his admission on his competitors. *Each will know that the time may come when he will himself be faced with the application of a competitor.*'"

It is an offense to intelligence to assert that there was no "restraint" of trade. The *NCAA* case and *Chicago Board of Trade* return this case to where it belongs, whether the restraint was unreasonable. And the jury's verdict ends that inquiry.

III. There Was Concert of Action.

We turn to "concert of action". Rule 4.3 was concerted action.[11] So was the vote of the member clubs refusing to allow the Raiders to leave Oakland.

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[11]As said in *Hennessey v. National Collegiate Athletic Ass'n,* 564 F.2d 1136, 1147 (5 Cir. 1977),

> "conceptually the adoption and execution of the NCAA Bylaw can be seen as the agreement and concert of action of the various members of the association, as well as that of the association itself . . . . Indeed, it should be taken as undisputed that the defendant has been a party to a contract or combination . . . ."

Petitioners sought, below, to escape that obvious conclusion by arguing that the 28 member clubs are a "single entity", no more capable of conspiring or agreeing than a man with himself. But that position is no longer so baldly taken in the petition. Its sole "question presented" asks whether "the league *agreement* designating the locations" is unlawful (see p. 1, *supra*). That very phrasing concedes that there was an *agreement,* and an "agreement" is the stuff of Sherman Act, Sec. 1. Moreover, the petition says, in a footnote to its "question":

> "Petitioners do not make, and this question does not raise, any contention that all actions by a league and its members are beyond attack under Section 1 of the Sherman Act."

But, if NFL and its members were a "single entity", the Sherman Act could never apply unless NFL concerted with nonmembers. An amoeba does not subdivide for some purposes and recoalesce for others.

NFL's argument of "single entity" was rejected in *North American Soccer, supra,* 670 F.2d at 1257, the Second Circuit characterizing it as a "loophole" "[t]o tolerate" which "would permit league members to escape antitrust responsibility . . . . " This Court denied certiorari, 459 U.S. 1074 (1982). The petition insists that the *Soccer* decision and this Court's denial of certiorari just two years ago were erroneous (Pet., p. 18). By asking the Court to change its mind now, it is asking the Court to bring itself within Justice Roberts' tart comment in *Smith v. Allwright,* 321 U.S. 649, 669 (1944), that "adjudications of this tribunal [should not be brought] into the same class as a restricted railroad ticket, good for this day and train only".

The petition refers to Justice Rehnquist's dissent from the denial of certiorari in *Soccer.* But Justice Rehnquist's opinion drew a distinction between a situation where the assailed rule is aimed by one sports league at a competing

sports league—as in *Soccer*—and a situation where the rule impedes competition *within* the NFL itself, precisely the situation of this case. Said Justice Rehnquist (459 U.S. at 1077):

> "[I]nterteam competition occurs when two teams are located in one major city, such as New York *or Los Angeles*. These teams compete with one another for home game attendance and local broadcast revenues. In all other respects [*i.e.*, not in that respect], the league competes as a unit against other forms of entertainment."

The petition tries to bring NFL's case within Justice Rehnquist's reasoning by asserting (p. 18) that the issue relates to NFL's activity "in a broad entertainment market". But that argument is foreclosed by the jury verdict, for the issue of what constituted the relevant market was put to the jury, and it found against a "broad entertainment market".[12] What constitutes the relevant market is a

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[12]The jury was told that NFL denied that NFL football alone can be treated as a relevant product market and contended that NFL football competes with many other forms of entertainment, that

> "all the parties agree that the second relevant product market includes at least NFL football. They disagree as to whether this second product market includes anything else. *You will have to decide this.*
>
> • • •
>
> "In this case, the broadest second relevant product market that you could find would include the entire field of entertainment; the narrowest would be NFL football alone." (Tr.2d 7213-14)

At pp. 25, 26 petition makes querulous comment about "relevant market", once more plucking phrases out of context (see comment at p. 20, *infra*). But nothing about "relevant market" is stated in any "question presented". The opinion of the court below (Pet., pp. 16a-21a) speaks for itself on the subject.

question of fact, *International Boxing Club v. United States,* 358 U.S. 242, 251 (1959), and, where a jury is the factfinder, its verdict is conclusive unless there is no substantial evidence whatever to support it, *Heatransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964, 979 (5 Cir. 1977), *cert. denied,* 434 U.S. 1087 (1978). And sufficiency of evidence of a particular case is not a certiorari matter.

The petition cites *Copperweld Corp. v. Independence Tube Corp.*, ... U.S. ....., 81 L.Ed.2d 628, 633, 104 S.Ct. 2731 (June 19, 1984). But that decision relates solely to "a parent corporation and its wholly owned subsidiary". Its reasoning is that the assailed conduct is the *unilateral* conduct of the parent. Where the parent gives *direction,* there is no concert of activity; no independent will of a second entity enters into what is done. There is merely the direction and control by the legal person which, under the law, has the power to *order* and *direct*, and it is irrelevant whether that person is a natural person or a corporation. As stated in Areeda, 97 Harv.L.Rev. 451, 470 (1983), "when a subsidiary obeys its owner's will" there is direction, not agreement. This Court remarked in *Copperweld* of a "parent and its wholly owned subsidiary", that "their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one". It said further:

> "We limit our inquiry to the narrow issue squarely presented: . . . . We do not consider under what circumstances, if any, a parent may be liable for conspiring with an affiliated corporation it does not completely own." (81 L.E.2d at 640-41)

The present case is not only not a parent-subsidiary case, it does not even have anything to do *with affiliated corporations.* As the petition concedes (at p. 2), the clubs are all under "separate ownership". Here there is *no vertical* relationship between the defendants, no club owns any interest

in any other, no one of them has any power of control over any other, the agreement among them is wholly a *horizontal* agreement among independent entities, each one of which controls its own affairs. The Raiders were excluded from Los Angeles, not at the direction of some top parent pulling strings on ventriloquist dummies, but upon the vote of the 27 independent clubs acting in horizontal agreement (Pet., p. 10a).

The assigned foundation of *Copperweld* is a conception of *reality*. To apply *Copperweld* here would be to move from reality to an area of metaphysical subtleties that could only lead to years of litigation picking at the onionskin of reasoning.

NFL (at p. 16) cites *Sunkist Growers v. Winckler & Smith Co.*, 370 U.S. 19 (1962). That had to do with the statutory exemption to the antitrust law given by Congress to cooperatives of agricultural producers. Sunkist, a cooperative, handled lemons through one wholly-owned subsidiary and oranges through another; the members of each were members of Sunkist. All that this Court held was that, inasmuch as *Congress* allows farmers to associate together, there is no reason why they may not associate through the medium of these corporations.

The petition (at p. 16) also cites *United States v. Citizens and Southern National Bank*, 422 U.S. 86 (1975), saying that in it this Court "characterized as a 'total lack of realism' a claim that a common enterprise consisting of a parent bank and several separate banks in which the parent held five percent stock interests was a conspiracy in violation of Section 1". This is creative "quotation"; the Court said no such thing. The petitioners pluck the words "total lack of realism" from quite a different sentence, which is this: "Putting to one side the total lack of realism in suggesting that C&S might have founded new banks that

would have competed vigorously with it and with each other . . . ." (422 U.S. at 119).[13]

In the end NFL's argument rests on the verbalism that it is a "joint venture". But NFL is not a partnership,[14] and, short of an actual partnership, "joint venture" has no immunizing quality. Neither authority nor reason supports petition's assertion (fn. 34, p. 21) that the terms "partnership" and "joint venture" are synonymous for purposes of antitrust analysis. In *NCAA v. Board of Regents of Univ. of Okla., supra,* ..... U.S. ....., 82 L.Ed.2d at 91, decided but eight days after the *Copperweld* case, this Court remarked that "joint ventures have no immunity from the antitrust laws". The term "joint venture" is merely a generality for some kind of concerted activity, and concerted activity is the very core of the antitrust law. The *nature* of a particular joint venture may enter into determination of "reasonableness", but the *fact* of a joint venture does not immunize concerted action from analysis of the reasonableness of the restraint.

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[13]In the *Citizens and Southern* case, a number of state banks in which C&S owned the maximum 5% interest allowed by law cooperated in ways found by the trial court not to be in violation of the Sherman Act. This Court's affirmance was based on the fact that the finding was not clearly erroneous, and that the intimate and continuous cooperation of consultation of the banks did not compel a finding contrary to that made by the factfinder that they were not conspiring to affect prices. In the present case we have the jury finding of an unlawful conspiracy.

[14]The essential elements of a partnership are the sharing of profits and losses, co-ownership by the partners of the partnership capital, and liability of each partner for the debts incurred by every other partner. See, *e.g., Arizona v. Maricopa County Medical Society,* 457 U.S. 332, 356 (1982); *Commissioner of Int. Rev. v. Tower,* 327 U.S. 280, 286 (1946); *Beckwith v. Talbot,* 95 U.S. 289 (1877); *Berthold v. Goldsmith,* 24 How. 536 (1861), and discussion of the trial court (Pet., p. 54a) and of the Court of Appeals (Pet., pp. 11a, 12a).

In the petition the term "economic entity" runs in double harness with "joint venture". But whether there is *concert* of action depends on whether there are separate *legal entities* not directed by a single head. "Economic entity" summons up economic analysis, and the place where economic analysis enters is in application of the Rule of Reason. Another of NFL's phrasing of the same idea is that NFL produces a singular product which it calls "league football". *Silver v. New York Stock Exchange,* 373 U.S. 341 (1963), describes the operations of stock exchanges in such a way as to show that they are just as much an "economic entity", performing the service or producing a singular product quite distinct from that of its members, as the NFL, but the Stock Exchange was held liable. In *Associated Press v. United States, supra,* 326 U.S. 1, 3-4 (1945), the Court described the Associated Press as "a cooperative association", its business being to produce a product or service quite distinct from that of its member newspapers, far more so than the NFL can be said to be doing something distinct from the individual teams. Justice Frankfurter there described it (p. 26):

> "The Associated Press is in essence the common agent of about 1300 newspapers in the various cities throughout the country for the interchange of news which each paper collects in its own territory, and for the gathering, editing, and distributing of news which these member papers *cannot collect single-handed, and which requires their pooled resources*".

The Associated Press was held liable. In *Broadcast Music, Inc. v. CBS,* 441 U.S. 1 (1979), the Court agreed with ASCAP's contention that its product was a different product from that of any of its members saying (pp. 21-22):

> "Here, the whole is truly greater than the sum of its parts; it is, to some extent, a different product."

But the Court's conclusion was *not* that ASCAP was immune. The conclusion was a remand to the Court of Appeals to explore the case under the Rule of Reason.

IV. There Is No Conflict in the Decisions. What NFL Seeks Is An Exemption from the Sherman Act that Only Congress Can Give.

Here, then, is a case where (1) there was concerted activity, (2) which effected a restraint of competition, and (3) a jury on proper instructions found the restraint to be unreasonable.

What remains? It is only that NFL marshals argument that for philosophical, emotional, or economic outlook entertained by sports aficionados or by those who look upon antitrust regulations differently than Congress did when it enacted the Sherman Act, a different law should be applied to professional football.

A. There Is No Conflict in the Decisions.

The petition does not claim that there is a *conflict* in judicial decisions warranting grant of a writ. It talks, instead, of confusion, "chaos", and of "struggle[s]" by courts. But the cited cases (Pet., pp. 7-8) are not in confusion or in chaos. In the numerous antitrust cases in which NFL has been sued over the years, the courts have patiently listened to NFL's arguments, always the same although rephrased in the language fads of the moment, and in every one has held challenged practices or rules to be unlawful except where there has been an explicit statutory exemption for the specific practice[15]; the "struggles" have been patient listening to NFL's contentions and reasoned rejection of them.

NFL's complaint (Pet., p. 9) that it is confronted with the Hobson's choice of being sued no matter what it does

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[15] *WTWV, Inc. v. National Football League*, 678 F.2d 142 (11 Cir. 1982).

is no different from what can be said by any industry. NFL has no greater burden in determining whether its rules and regulations are valid under the antitrust laws than innumerable trade associations which must determine what cooperative activities are valid and useful and what go too far. It has been advised repeatedly of the vulnerability of its rules (see pp. 4, 5, *supra*). The heart of the matter is that NFL will not heed. Let it but reconcile itself to the fact that it too must obey the law and it will have peace of mind.

B. What NFL Seeks Only Congress Can Give, and Congress Has Repeatedly Refused.

In 1958, when Bert Bell was its Commissioner, NFL requested Congress to exempt its territorial rules and Congress declined to do so (see pp. 3-4, *supra*). In 1964, Mr. Rozelle having become Commissioner, NFL again asked Congress for an exemption of a number of its rules, including its territorial rules, and sought enactment of S. 2391.[16] Mr. Rozelle urged on Congress exactly the same arguments made in the present petition, saying (p. 112):

> "the member clubs of a professional football league are in a unique relationship. We view the league as a joint venture or form of partnership, with the commissioner acting as the presiding officer."

The bill died in committee. It was re-presented in 1965 as S. 950.[17] Mr. Rozelle summoned up the same argument, saying (p. 198):

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[16]Hearings Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, 88th Congress, Second Session, on "Professional Sports Antitrust Bill—1964".

[17]Hearings Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, 89th Congress, First Session, on "Professional Sports Antitrust Bill—1965."

> "There is first the unique relationship which exists among member clubs of a sports league. On the playing field, they are clearly competitors—and every effort must be made to preserve this relationship. But in most other areas of their operations, they are partners or joint venturers acting together in a common enterprise."

Again, Congress did not grant the exemption.

In 1966 NFL obtained exemption from Congress for merger with AFL. The present petition (at p. 19) tries to squeeze more out of the 1966 Act, but NFL obtained that exemption by assuring Congress at the time that the bill would not grant the exemption refused by Congress in 1964 and 1965 and that NFL would still have to answer under the Sherman Act in all other respects and particularly as respects the very rules about territorial rights and removal of clubs.[18]

Since the Raiders sought to move to Los Angeles in early 1980, numerous bills have been introduced in Congress to regulate the subject of professional team relocation. Some would lay down a set of objective guidelines (*e.g.*, H.R. 823 and H.R. 3287, introduced in 1981). Others would set up a regulatory administrative agency (*e.g.*, "Sports Competition Act of 1983", introduced on May 23, 1983, as H.R. 3094, and H.R. 3944 introduced on September 21, 1983). NFL has opposed these bills, for it wants free license left in its own hands. The bills NFL has proposed or supported would do

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[18]Hearings of the Antitrust Committee of the House Committee on the Judiciary on S. 3817, "Professional Football League Merger". Commissioner Rozelle so assured the Committee at page 68.

In response to direct questions by Mr. Kenneth R. Harkins, Chief Counsel of the Subcommittee, and by the Chairman, the Honorable Emanuel Celler, about "territorial rights, removal of teams, entry of new clubs, . . . all the provisions of your constitution and bylaws"; "How about territorial rights? How about removal of teams?", NFL's counsel, Mr. Carothers answered that "this is not what [NFL] wants", it wanted no more than to be free of challenge as a result of a merger (pp. 78, 79).

just that, such as H.R. 6467, introduced in the 97th Congress, Second Session, on May 21, 1982, and H.R. 2041 introduced in 1983, which sought to legislate

> "that—(1) It shall not be unlawful by reason of any provision of the antitrust laws for a professional team sports league and its member clubs—
>
> "(a) to enforce rules requiring approval by the membership of the league for any relocation of a member club of such league."[19]

Both H.R. 6467 and H.R. 2041 would apply to pending actions unless a final unappealable judgment preceded enactment; this was obviously an attempt to have Congress wipe out the instant action retroactively. A similar bill was introduced in the Senate on July 28, 1982, as S. 2784; another similar bill was introduced as S. 2821.[20] The deluge of bills has continued into the 98th Congress in 1984, with H.R. 5388, on April 5, 1984, and H.R. 5430, entitled "Professional Sports Team Community Protection Act", on April 11, 1984.

No bill has emerged from Committee. That fact shows that Congress is yet to be convinced that the interests of the nation are not best served by letting professional football answer to the same antitrust law as the rest of the citizenry and business in general.

Human wit is incapable of conceiving, and human pen of expressing, any judicial formula that would exempt NFL's activities from the antitrust principles while at the

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[19]Oversight Hearings Before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, House of Representatives, Ninety-Seventh Congress, First and Second Sessions, on H.R. 823, H.R. 3287, and H.R. 6467, Antitrust Policy and Professional Sports, Serial No. 114.

[20]Hearings Before the Committee on the Judiciary, United States Senate, Ninety-Seventh Congress, Second Session, Serial No. J-97-134, on "Professional Sports Antitrust Immunity".

same time not plunging the entire business world and the whole body of antitrust law into years of litigation. Courts must state a coherent body of law, and any attempted non-legislative distinctions can only metastasize.

CONCLUSION

Over 25 years ago, in *Radovich v. National Football League, supra,* 352 U.S. 445 (1957), this Court drily described NFL's argument for exemption from the antitrust laws as being that "the contracts and sanctions . . . that football find[s] it necessary to impose have no counterpart in other businesses [other than baseball] and that, therefore, they . . . are outside the ambit of the Sherman Act" (p. 450). The Court said that the claim "need only be 'tested under the Sherman Act's general prohibition on unreasonable restraints of trade' " (p. 453) and that it is the law of the land "that such prohibited activities are injurious to the public" (p. 453).

The arguments of the petition are identical in substance with those urged on the Court in *Radovich.* They should be given the same answer now as then.

We respectfully submit that the petition should be denied.

Dated: San Francisco, California, October 12, 1984

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